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AMBANK (M) BHD v. METAL RECLAMATION (INDUSTRIES) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[SUIT NO: 22NCC-365-09-2014]
5 MAY 2015

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CIVIL PROCEDURE: *Summary judgment – Banking – Credit facilities – Borrower defaulted in repayment – Claim for repayment against borrower and guarantors – Application for summary judgment – Borrower and first guarantor obtained restraining order against summary judgment pursuant to restructuring scheme to compromise borrower's debts with bank – Court restrained from proceeding with trial – Whether there were triable issues – Whether summary judgment ought to be entered against borrower and guarantors*

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CIVIL PROCEDURE: *Stay of proceedings – Stay pending outcome of certain event – Default in repayment of credit facilities – Claim for repayment against borrower and guarantors – Application for summary judgment – Borrower and first guarantor obtained restraining order against summary judgment pursuant to restructuring scheme to compromise borrower's debts with bank – Court restrained from proceeding with trial for borrower and first defendant but proceeded with second to fourth guarantors – Second to fourth guarantors applied for stay of proceedings pending expiry of restraining order – Whether restraining order could apply to company's guarantor – Whether there were special circumstances warranting court to exercise discretion to stay proceedings*

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The plaintiff had given various credit facilities to the first defendant which were guaranteed by the second to fifth defendants. When the first defendant defaulted in repayment of the credit facilities, the plaintiff sent, *inter alia*, a demand for the same to the second to fifth defendants. However, there was no reply from any of them. This prompted the plaintiff to initiate an action against the defendants for, *inter alia*, the repayment of RM1,522,200.22 with costs and interests ('the suit'). In the suit, the plaintiff filed an application for summary judgment against the defendants ('encl. 8'). The first and second defendants applied to another High Court and obtained, *inter alia*, a restraining order under s. 176(10) of the Companies Act 1965 ('the CA') pursuant to a restructuring scheme to compromise the first defendant's debts with the plaintiff. In view of the restraining order, the court could not proceed with encl. 8 against the first and second defendants. Before the court could proceed to hear encl. 8 against the third to fifth defendants, they filed an application to, *inter alia*, stay the suit pending the expiry of the restraining order ('encl. 14'). The issues that arose for determination were (i) whether guarantors for a bank's credit facilities to a borrower may apply to stay the bank's suit against the guarantors until the expiry of a restraining order of the High Court obtained by the borrower under s. 176(10) of the CA

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pursuant to a scheme to compromise the borrower's debts with the borrower's creditor's; and (ii) whether the bank can apply for summary judgment against the guarantors.

Held (allowing encl. 8 with costs; dismissing encl. 14 with costs):

(1) Sections 73 and 102 of the Courts of Judicature Act 1964; r. 13 of the Rules of the Court of Appeal 1994; and r. 52 of the Rules of the Federal Court 1995 do not empower the court to stay proceedings pending the outcome of a certain event. As such, these provisions do not support encl. 14. The court may only stay a proceeding pending the outcome of a certain event pursuant to the court's inherent powers under O. 92 r. 4 of the Rules of Court 2012 ('the ROC'). However, the third to fifth defendants failed to discharge their legal burden to prove special circumstances to persuade the court to exercise such discretion. (paras 17, 28, 30 & 40)

(2) By applying s. 176(10F) and (10G) of the CA, even if the third to fifth defendants were able to establish special circumstances, the court could not allow encl. 14. The literal meaning of s. 176(10F) and (10G) is very clear that a restraining order granted under s. 176(10) could not apply to a company's guarantor. Accordingly, based on s. 176(10F) and (10G), encl. 14 could not be allowed as a matter of law. If the court acceded to encl. 14, it would mean that the restraining order applied indirectly to the third and fifth defendants in the suit. This will be contrary to the literal meaning of s. 176(10F) and (10G) of the CA. (paras 38 & 39)

(3) There was an unexplained delay of one and a half months in filing encl. 14. The restraining order had been obtained on 18 November 2014 but encl. 14 was only filed on 8 January 2015, four days before the first hearing of encl. 8. Unexplained inordinate delay in filing a stay application may constitute a ground for the court to refuse to exercise its discretion to allow the stay application, even if there exists special circumstances. Enclosure 14 had been filed merely to delay the disposal of encl. 8 and such a delay had indeed been occasioned. (para 42)

(4) In the exercise of its discretion pursuant to O. 59 r. 22(1)(c)(i) read with Part I of the Appendix to O. 59 of the ROC, the court granted costs of RM4,000 to the plaintiff in respect of encl. 8. Enclosure 8 (i) was a simple and straightforward summary judgment application based on trite law of guarantee with no novel question of law; and (ii) did not concern many documents as the plaintiff filed two affidavits while the third to fifth defendants filed only one affidavit. Even if the third to fifth defendants could not raise any triable issues, encl. 8 may still be dismissed under O. 14 r. 3(1) of the ROC if there are circumstances that ought to be investigated by the court. However, there were no

A circumstances that ought to be investigated in respect of the third to fifth defendants. Hence, there was no other reason for trial in relation to the third to fifth defendants. (paras 50, 71 & 74)

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee) [1994] 2 CLJ 1 SC ***(foll)***

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Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24 FC ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

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Bank Kerjasama Rakyat Malaysia Bhd v. Brampton Holdings Sdn Bhd [2015] 4 CLJ 635 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Bank Pertanian Malaysia Bhd v. Cahaya Piramid (M) Sdn Bhd & Yang Lain [2014] 1 LNS 1521 HC ***(refd)***

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Board of Governors of Sekolah Menengah St Gabriel v. Ranjit Singh [1969] 1 LNS 16 HC ***(dist)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***

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Chong Wooi Leong & Ors v. Lebbey Sdn Bhd [1998] 2 CLJ 509 CA ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***

David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***

Hyde v. Wrench [1840] 49 ER 132 ***(refd)***

Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd [2013] 3 CLJ 47 CA ***(refd)***

JEC Designabuild Sdn Bhd v. Bunga Kembang Sdn Bhd [2007] 1 AMR 578 ***(refd)***

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Jetara Sdn Bhd v. Maju Holdings Sdn Bhd [2007] 3 CLJ 41 CA ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Malaysia Debt Ventures Berhad v. MK Construction & Communication Sdn Bhd & Ors [2012] 1 LNS 272 HC ***(refd)***

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Maziah Musa v. Zainulabidin Mat Akhir, Dato' & Ors [2014] 1 LNS 1034 HC ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 SC ***(foll)***

Multi Square Sdn Bhd v. Lee Chee Meng [2015] 1 LNS 187 HC ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

H

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Noh Hyoung Seok v. Perwira Affin Bank Bhd [2004] 2 CLJ 64 CA ***(dist)***

OCBC Bank (Malaysia) Bhd v. THS Hardware Sdn Bhd & Ors [2012] 1 LNS 722 HC ***(refd)***

Pacific Bunkers Pte Ltd v. Owners of the ships or vessels "Geniki Sarawak" and "Geniki Johor" & Another Case (No 2) [2015] 7 CLJ 1071 HC ***(refd)***

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Southern Bank Bhd v. Cempaka Aras (M) Sdn Bhd & Ors [2009] 1 LNS 250 HC ***(refd)***

Tan Chong Keat v. Pengurusan Danaharta Nasional Bhd [2008] 4 CLJ 748 CA ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC ***(refd)***
United Overseas Bank (Malaysia) Bhd v. Hytex Integrated Bhd & Another Case [2014] 1 LNS 1068 HC ***(refd)***
Universal Trustees (Malaysia) Bhd v. Lambang Pertama Sdn Bhd & Anor [2014] 1 LNS 797 HC ***(refd)***
Woolley Development Sdn Bhd v. Mikien Sdn Bhd [2008] 2 CLJ 303 CA ***(refd)***
YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd & Another Case (1) [1989] 2 CLJ 148; [1989] 1 CLJ (Rep) 186 SC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 176(1), (10), (10F), (10G)
Contracts Act 1950, s. 7(a)
Courts of Judicature Act 1964, ss. 25(2), 73, 102
Evidence Act 1950, ss. 91, 92
Rules of Court 2012, O. 14 rr. 1(1), 2(1), 3(1), 4(1), O. 18 rr. 12(3), 19(1)(b), (d), O. 34 r. 1(1), O. 59 r. 22(1)(c)(i), O. 92 r. 4
Rules of the Court of Appeal 1994, r. 13
Rules of the Federal Court 1995, r. 52

For the plaintiff - Lian Shar Hoong; M/s Albar & Partners
For the 3rd, 4th & 5th defendants - Vincent Lim; M/s Dennis Nik & Wong

Reported by Najib Tamby

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] This case discusses the following two questions:

(a) Whether guarantors for a bank's credit facilities to a borrower company may apply to stay the bank's suit against the guarantors until the expiry of a restraining order of the High Court obtained by the borrower company under s. 176(10) of the Companies Act 1965 (CA) pursuant to a scheme:

(i) to compromise the borrower company's debts with the borrower company's creditors; and

(ii) of arrangement between the borrower company and its shareholders.

The above scheme is commonly known as a company's "restructuring" scheme; and

(b) Whether the bank may apply for summary judgment against the guarantors in this case.

A **Background**

[2] The plaintiff bank (plaintiff) has given various credit facilities (credit facilities) to the first defendant company (first defendant).

[3] The first defendant's repayment of the credit facilities has been
B guaranteed by the following parties:

(a) Corporate guarantees by the second defendant company (second defendant);

(b) A guarantee dated 25 February 2013 (first guarantee) given jointly by the third defendant company (third defendant), fourth defendant (fourth
C defendant) and fifth defendant (fifth defendant); and

(c) A guarantee dated 25 February 2013 (second guarantee) executed jointly by the fourth and fifth defendants.

[4] The first defendant has defaulted in respect of the repayment of the
D credit facilities and the plaintiff has sent, among others, a demand dated 5 September 2014 to the second, third, fourth and fifth defendants to repay the credit facilities (plaintiff's demand). There was no reply to the plaintiff's demand by any one of the second to fifth defendants.

[5] The plaintiff filed this action (this suit) against the first to fifth
E defendants (collectively referred in this judgment as "defendants") on 25 September 2014 to claim from the defendants for, among others, the following relief:

(a) Repayment of the sum of RM1,522,200.22 as at 31 August 2014 (sum);

F (b) Interest on the sum at the rate of 3% per annum above the prevailing base lending rate of 6.85% per annum with penalty interest at the rate of 1% from 1 September 2014 until full payment; and

(c) Costs on a solicitor-client basis.

G **[6]** On 29 October 2014, in this suit the plaintiff filed an application for summary judgment against the defendants (court encl. No. 8).

[7] After the filing of court encl. No. 8, the first and second defendants applied to Shah Alam High Court (SAHC) by way of an *ex parte* originating summons and obtained the following order on 18 November 2014 (SAHC
H order). The SAHC Order provides for, among others, the following:

(a) The first and second defendants be given liberty to hold meetings (creditors' meetings) with specified creditors (scheme creditors) of the first and second defendants pursuant to s. 176(1) CA to discuss and, if considered fit, to approve, with or without modification, a proposed
I scheme of arrangement and compromise for the first and second defendants (scheme). The plaintiff was listed as one of the scheme

creditors with the first defendant's admission that the first defendant owed a sum of RM1,502,561.38 as at 30 June 2014 in Appendix 2 of the Schedule to the SAHC Order (first defendant's admission);

(b) The first and second defendants be given liberty to hold meetings with their members (members' meeting) to discuss and, if considered fit, to approve, with or without modification, the scheme;

(c) Creditors' Meetings and Members' Meeting shall be held within 120 days from the date of SAHC order; and

(d) All further proceedings or actions against the first and second defendants by the scheme creditors but not limited to any winding up proceedings or the taking of any action or proceeding under any guarantee or indemnity granted by the first and second defendants, any enforcement or any other form of execution of any judgment or order against the first and second defendants, be restrained for a period of 90 days from the date of the SAHC order (restraining order).

[8] In view of the restraining order, this court cannot proceed with Court Encl. No. 8 against the first and second defendants. This court then proceeds to hear Court Encl. No. 8 as against the third to fifth defendants.

[9] Before Court Encl. No. 8 could be heard against the third to fifth defendants, the third to fifth defendants filed an application (Court Encl. No. 14) to, among others, stay this suit until the expiry of the restraining order.

Parties' Submission For Court Encl. No. 14

[10] In support of Court Encl. No. 14, learned counsel for the third to fifth defendants submitted as follows:

(a) Based on the Federal Court case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, the court has discretion to stay this suit until the expiry of the restraining order if there exists special circumstances;

(b) There exist special circumstances in this case for the following reasons:

(i) the plaintiff has granted credit facilities to the first defendant and the second defendant is the first defendant's corporate guarantor. The third to fifth defendants as the first defendant's guarantors, do not have "direct and thorough knowledge" of the credit facilities. In view of the restraining order, the first and second defendants did not file defence and affidavit to oppose Court Encl. No. 8. The third to fifth defendants alleged that they had been prejudiced by the lack of defence and affidavit from the first and second defendants in this suit. Accordingly, Court Encl. No. 14 should be allowed in view of such a prejudice to the third to fifth defendants; and

(ii) if the scheme is passed at the Creditors' Meetings and Members' Meeting, this would settle the plaintiff's claim against the first and second defendants and this in turn would affect the plaintiff's claim against the third to fifth defendants. In the written submission of the third to fifth defendants, it was submitted that the outcome of the scheme would have "a crucial and determining effect" on the liability of the third to fifth defendants in this suit;

(c) Reliance has been placed on Raja Azlan Shah J's (as His Royal Highness then was) judgment in the High Court case of *Board of Governors of Sekolah Menengah St Gabriel v. Ranjit Singh* [1969] 1 LNS 16; [1970] 1 MLJ 38, at 39 (*Ranjit Singh*'s case), as follows:

> I hold the view that a stay of proceedings is a matter of discretion and the court must exercise its discretion as to what is the fairest mode, upon taking all matters into consideration of trying the several disputes which exist between the parties. In one case one consideration may have more sway, more cogency, and more effect than that same consideration, perhaps, may have in another. Putting it in another way, the court must exercise its discretion whenever it is just and reasonable to do so.

Based on *Ranjit Singh*'s case, the third to fifth defendants contend that a stay of this suit until the expiry of the restraining order is "just, fair and reasonable"; and

(d) A stay of this suit will prevent duplicity and multiplicity of proceedings and appeals.

[11] The plaintiff resists Court Encl. No. 14 on the following grounds:

(a) The third to fifth defendants have failed to show special circumstances to justify a stay of this suit. According to the plaintiff, the restraining order does not amount to special circumstances. The plaintiff relies on the following cases:

(i) *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1;

(ii) Abu Bakar Jais JC's decision in *United Overseas Bank (Malaysia) Bhd v. Hytex Integrated Bhd & Another Case* [2014] 1 LNS 1068; and

(iii) the High Court case of *Bank Pertanian Malaysia Bhd v. Cahaya Piramid (M) Sdn Bhd & Yang Lain* [2014] 1 LNS 1521;

(b) The restructuring exercise of the first and second defendants has nothing to do with Court Encl. No. 8 against the third to fifth defendants;

(c) The restraining order has been obtained by the first and second defendants on 18 November 2014 but Court Encl. No. 14 is only filed by the third to fifth defendants on 8 January 2015, four days before the

first hearing of Court Encl. No. 8. Hence, the plaintiff alleges that Court Encl. No. 14 is an "afterthought" which is merely to delay the disposal of Court Encl. No. 8 against the third to fifth defendants; and

(d) The balance of convenience is against the granting of a stay of this suit.

Power To Stay Execution Of Order Or Judgment Pending Appeal

[12] Sections 73 and 102 of the Courts of Judicature Act 1964 (CJA) provide as follows:

> 73. **An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders** and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.
>
> 102. **An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Federal Court so orders** and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.
>
> (emphasis added)

[13] Rule 13 of the Rules of the Court of Appeal 1994 (RCA) states as follows:

> **An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders** and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.
>
> (emphasis added)

[14] Rule 52 of the Rules of the Federal Court 1995 (RFC) reads as follows:

> **An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court of Appeal or the Court so orders** and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.
>
> (emphasis added)

[15] Sections 73 and 102 CJA, r. 13 RCA and r. 52 RFC provide the statutory jurisdiction for the High Court, Court of Appeal and Federal Court to stay:

(a) Execution of any order or judgment; and

(b) Proceedings

pending the disposal of an appeal to the Court of Appeal or the Federal Court, as the case may be.

[16] In *Chong Wooi Leong & Ors v. Lebbey Sdn Bhd* [1998] 2 CLJ 509, at 521-525, Abu Mansor and Ahmad Fairuz JJCA (as their Lordships then were) delivered the majority of the Court of Appeal's decision which held

A that an applicant for leave of the Federal Court to appeal against a Court of Appeal's decision, may apply to stay the execution of the Court of Appeal's decision pending the disposal of the leave application.

[17] Sections 73 and 102 CJA, r. 13 RCA and r. 52 RFC, in my view, do not empower the court to stay proceedings pending the outcome of a certain
B event. As such, these provisions do not support Court Encl. No. 14.

[18] It is to be noted that *Kosma Palm Oil Mill Sdn Bhd* does not concern an application to stay proceedings. In *Kosma Palm Oil Mill Sdn Bhd*, at p. 6 and pp. 17-19:

C (a) The applicants entered into agreements to purchase estate lands from the respondents. Pursuant to such agreements, the applicants took possession of the estate lands;

(b) There was a dispute regarding the completion of the agreements in question and the respondents regained possession of the estate lands.
D Consequently, the applicants obtained an interim injunction from the High Court against the respondents which resulted in the applicants re-taking possession of the estate lands;

(c) The High Court subsequently dissolved the interim injunction but granted an Erinford injunction pending the disposal of the applicants'
E appeal to the Court of Appeal against the dissolution of the interim injunction;

(d) The Court of Appeal dismissed the applicants' appeal and the Erinford injunction therefore lapsed. The respondents then applied to the High
F Court for possession of the estate lands and this was granted by the High Court (order for possession of lands);

(e) The applicants appealed to the Court of Appeal against the order for possession of lands. The High Court dismissed the applicants' first application to stay the execution of the order for possession of lands.
G Hence, the applicants applied to the Court of Appeal to stay the execution of the order for possession of lands. The Court of Appeal dismissed the appeal (Court of Appeal's decision) and the stay of execution application;

(f) The applicants applied to the Federal Court for leave to appeal against
H the Court of Appeal's decision (leave application). Pending the disposal of the leave application, the applicants applied to the Federal Court to stay the execution of the order for possession of lands; and

(g) The Federal Court dismissed the application to stay the execution of the order for possession of lands on the ground that there were no special
I circumstances.

It is clear that *Kosma Palm Oil Mill Sdn Bhd* concerns only an application to stay execution of a court order and does not pertain to the court's power to stay proceedings as applied for in Court Encl. No. 14.

[19] The following cases cited by both learned counsel in respect of Court Encl. No. 14 concern applications to stay execution of court orders pending the disposal of appeals against such orders:

(a) In *United Overseas Bank (M)*, at paras. 5 and 6, the respondent company applied to stay the winding up order pending the disposal of an appeal against the winding up order; and

(b) The High Court dismissed an application to stay the execution of a summary judgment pending an appeal against the summary judgment in *Bank Pertanian Malaysia Bhd*, at paras. 41 and 46-49.

Power To Stay Proceedings Pending Appeal

[20] Sections 73 and 102 CJA, r. 13 RCA and r. 52 RFC empower the court to stay proceedings pending the disposal of an appeal and not pending the outcome of a certain event.

[21] In *Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd* [2013] 3 CLJ 47; [2013] 4 MLJ 213, at pp. 217-218:

(a) The appellant filed a winding up petition against the respondent company. Pending the disposal of the winding up petition, the appellant applied for and obtained an order to appoint a provisional liquidator over the respondent company;

(b) The respondent company applied successfully to the High Court to strike out the winding up petition. The High Court subsequently directed the provisional liquidator to apply to discharge himself (direction); and

(c) The appellant appealed to the Court of Appeal against the High Court's decision and pending the disposal of this appeal, the appellant applied to stay the High Court winding up proceedings (presumably to stay the direction).

It is clear that *Jagdis Singh* concerns an application to stay High Court proceedings pending the disposal of an appeal to the Court of Appeal under s. 73 CJA and r. 13 RCA. *Jagdis Singh* does not concern the court's power to stay proceedings pending the outcome of a certain event.

Power To Stay Proceedings Due To *Res Judicata* And Duplicity Of Proceedings

[22] Section 25(2) of the CJA states that the High Court shall have additional powers set out in the Schedule to the CJA. Paragraph 11 of the Schedule to the CJA (para. 11) provides as follows:

A *Res judicata*

11. *Power to dismiss or stay proceedings where the matter in question is res judicata between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.*

(emphasis added)

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[23] According to para. 11, the High Court may dismiss or stay proceedings in the following circumstances:

(a) Where the suit in question is *res judicata* between the parties. In other words, where there is an earlier action where the court has finally C adjudicated the dispute in question, the doctrine of *res judicata* applies to bar the subsequent suit – please see the Supreme Court's judgment in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, at p. 197; or

(b) Where there are two or more pending proceedings in respect of the same D dispute, there is therefore an abuse of court process in the form of duplicity or multiplicity in proceedings.

[24] In *Universal Trustees (Malaysia) Bhd v. Lambang Pertama Sdn Bhd & Anor* [2014] 1 LNS 797; [2014] 5 AMR 57, at pp. 73-74, I express the view that if a suit is a duplicity or multiplicity:

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(a) The court can strike out such a suit on the ground that the suit is vexatious (under O. 18 r. 19(1)(b) of the Rules of Court 2012 (RC)) and constitutes an abuse of court process (under O. 18 r. 19(1)(d) RC as well as under the court's inherent jurisdiction); and

F (b) According to the proviso to s. 25(2) CJA, para. 11 is subject to "Rules of Court", namely, para. 11 is made expressly subject to O. 18 r. 19(1)(b) and (d) RC.

[25] The material facts in *Ranjit Singh*'s case, at pp. 39 and 40 are as follows:

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(a) The appellant employed the respondent as a watchman and allowed the respondent to occupy a portion of the school premises rent free;

(b) The appellant terminated the respondent's services and requested the respondent to leave the school premises which the respondent refused to H do so;

(c) The appellant filed a suit in the Sessions Court to eject the respondent from the school premises (first action);

(d) The respondent subsequently filed an action in the High Court to apply I for a declaration and damages that the respondent had been wrongfully dismissed by the appellant (second action); and

(e) The respondent applied successfully to the Sessions Court to stay the first action pending the outcome of the second action (Sessions Court's stay).

On appeal, the High Court reversed the Sessions Court's stay and ordered the first action to be "tried as speedily as possible".

[26] I am of the following view regarding *Ranjit Singh*'s case:

(a) In *Ranjit Singh*'s case, there were two pending suits and yet, the High Court did not exercise its discretion to stay the first action pending the outcome of the second action. Paragraph 11 would have been applicable on the facts of *Ranjit Singh*'s case; and

(b) *Ranjit Singh*'s case is easily distinguishable from this case. This is because there is only one suit in this case. Paragraph 11 therefore does not apply to this suit as there is no duplicity or multiplicity of actions. Accordingly, the third to fifth defendants cannot rely on para. 11 or *Ranjit Singh*'s case to sustain Court Encl. No. 14.

Power To Stay Proceedings Pending Outcome Of Certain Event

[27] I am not able to find any reported case which has decided an application to stay a suit pending the outcome of a specified event, in particular until the expiry of a restraining order under s. 176(10) CA.

[28] I am of the opinion that the court may only stay a proceeding pending the outcome of a certain event pursuant to the court's inherent powers under O. 92 r. 4 RC so as to prevent an injustice and/or an abuse of court process. Order 92 r. 4 RC provides as follows:

> For the removal of doubt it is hereby declared that **nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court**.
>
> (emphasis added)

[29] In *Pacific Bunkers Pte Ltd v. Owners of the ships or vessels "Geniki Sarawak" and "Geniki Johor" & Another Case (No 2)* [2015] 7 CLJ 1071; [2015] 2 AMR 887, I have expressed the view that O. 92 r. 4 RC may be resorted to stay the hearing of one interlocutory application (X application) pending the disposal of another interlocutory application (Y application) if there will be an injustice or an abuse of court process if the court first hears X application before deciding Y application.

Burden And Standard Of Proof To Stay An Action Pending Outcome Of Certain Event

[30] As stated above, I cannot find a reported case which is similar to this case. The legal burden to persuade the court to exercise its discretion to stay a suit pending the outcome of a certain event under O. 92 r. 4 RC, in my

A view, should be on the applicant for the stay of proceedings (applicant). This is because the court is obliged under O. 34 r. 1(1)(b) RC to secure the just, expeditious and economical disposal of cases. In *Jagdis Singh*, at p. 222, Zawawi Salleh JCA delivered the Court of Appeal's judgment as follows:

> It is important to stress that initiation of a suit in a court of law demands
B the suit will be heard expeditiously and completed without any inhibition midway.

Accordingly, the applicant should bear the legal onus to satisfy the court why a suit should not be expeditiously disposed of and instead, should be stayed pending the outcome of a specified event.

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[31] There is no previous precedent on how the applicant may persuade the court to exercise its discretion to stay a suit pending the outcome of a specified event. I am inclined to follow the "special circumstances" test which is applicable to applications for stay of execution of orders and
D judgments pending disposal of appeals as well as stay of proceedings pending disposal of appeals ("stay pending appeal" applications). The adoption of a similar test of "special circumstances" for stay of proceedings pending the outcome of a certain event, will ensure uniformity in the exercise of judicial discretion in respect of stay applications irrespective of whether there is a pending appeal or otherwise. There is no reason why I should adopt a test
E in this case which is different from "stay pending appeal" applications.

[32] If I adopt the "special circumstances" test as explained above, I cannot accept the contention of the third to fifth defendants that a stay of this suit against the third to fifth defendants should be granted on the ground that it
F is "just, fair and reasonable" to do so. There is another reason why the court should not stay an action merely because it is "just, fair and reasonable" to do so. Order 34 r. 1(1)(b) RC and public policy require cases to be expeditiously decided (general rule). As an exception to the general rule, a suit can only be stayed pending the outcome of a specified event if there are special circumstances to stay such an action so as to prevent an injustice or
G an abuse of court process within the meaning of O. 92 r. 4 RC (please see the discussion below regarding the application of O. 92 r. 4 RC). Accordingly, I cannot apply the wide "just, fair and reasonable" test to decide Court Encl. No. 14 as the application of such a broad test will inevitably undermine the general rule.

H

[33] If the third to fifth defendants cannot establish special circumstances to stay this suit third to fifth defendants, Court Encl. No. 14 should be dismissed with costs.

[34] In adopting the "special circumstances" test, this court cannot accede
I to the "balance of convenience" test submitted by the plaintiff's learned counsel – please see *Maziah Musa v. Dato Zainulabidin Mat Akhir & Ors* [2014] 1 LNS 1034; [2014] 5 AMR 793, at pp. 809-810.

[35] As the only basis for the court to stay a suit pending the outcome of a specified event is O. 92 r. 4 RC, I am of the considered view that in addition to proving "special circumstances", by reason of O. 92 r. 4 RC, the applicant must also persuade the court that if the action in question is not stayed, there will be an:

(a) Injustice; or

(b) Abuse of court process.

Suit Against Guarantors Should Not Be Stayed Until Expiry Of Restraining Order

[36] In respect of the restraining order, I refer to the relevant part of s. 176 CA as follows:

> Section 176. Power to compromise with creditors and members
>
> (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.
>
> …
>
> Power of Court to restrain proceedings
>
> (10) *Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.*
>
> ...
>
> (10F) *An order made by the Court under subsection (10) shall not have the effect of restraining further proceedings in any action or proceeding against any person other than the company that had applied for the restraining order.*
>
> (10G) **For the purpose of subsection (10F), the term "any person" includes a guarantor of the company**.
>
> (emphasis added)

[37] Subsections (10F) and (10G) of s. 176 CA have been specifically inserted by the Companies (Amendment) Act 2000 (Act A1081) (Amendment Act).

[38] The literal meaning of s. 176(10F) and (10G) CA is very clear that a restraining order granted under s. 176(10) CA cannot apply to a company's guarantor. Accordingly, based on s. 176(10F) and (10G) CA, I am of the considered view that Court Encl. No. 14 cannot be allowed as a matter of law. This is because if this court accedes to Court Enc. No. 14, this means the restraining order applies indirectly to the third to fifth defendants in this suit. This will not only be contrary to the literal meaning of s. 176(10F) and (10G) CA but this will also defeat the purpose of the Amendment Act to exclude a company's guarantor from the scope of a restraining order.

[39] By applying s. 176(10F) and (10G) CA in this case, even if the third to fifth defendants are able to establish "special circumstances" in this case, this court cannot allow Court Encl. No. 14.

[40] Alternatively or additionally, I find that the third to fifth defendants are not able to discharge their legal burden to prove the existence of "special circumstances" in this case. I say so for the following reasons:

(a) The liability of the third to fifth defendants to the plaintiff under the first and second guarantees is separate from and is independent of the first defendant's liability to the plaintiff in respect of the credit facilities. This is clear from the following provisions in the first and second guarantees (which are identical in the first and second guarantees):

(i) clause 1 states that the third to fifth defendants "irrevocably and unconditionally guarantee jointly and severally" to pay the plaintiff "upon demand" made by the plaintiff (cl. 1). Clause 1 only provides that the liability of the third to fifth defendants under the first and second guarantees, is based solely on the service of the plaintiff's demand (which will be explained later in this judgment) and does not depend on any other matter, including the:

(1) Restraining order;

(2) SAHC Order;

(3) Scheme; and

(4) outcome of the Creditors' Meeting and Members' Meeting; and

(ii) clause 16 provides that the third to fifth defendants are "joint and several principal debtors" (cl. 16). In *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24; [2012] 3 MLJ 449, at 459, the Federal Court in a judgment given by Zulkefli Makinudin CJ (Malaya) held that if a guarantee has provided that a guarantor stands as a principal debtor to a bank, the guarantor is "primarily liable for losses which the principal borrower could not have been made liable" and the guarantor's "liability is not dependent or secondary to the liability of the principal borrower";

(b) The scheme disclosed the first defendant's admission. As explained below, the first defendant's admission supports Court Encl. No. 8 in this case. In view of cls. 1 and 16 as well as the first defendant's admission, I am unable to see how the outcome of the creditors' meeting and members' meeting will have "a crucial and determining effect" on the liability of the third to fifth defendants to the plaintiff in this suit. Even if this court assumes that the Creditors' Meeting and Members' Meeting approve the scheme and the first defendant's liability to the plaintiff is thereby "reduced", the third to fifth defendants are still liable for the sum under the first and second guarantees as principal debtors; and

(c) As the liability of the third to fifth defendants to the plaintiff under the first and second guarantees is independent of the first defendant's liability in respect of the credit facilities, any defence and affidavit which may be filed on behalf of the first defendant in this suit, will not be relevant to the third to fifth defendants. Accordingly, there is no prejudice to the third to fifth defendants by the lack of defence and affidavit of the first defendant in this case. Similarly, as the liability of the third to fifth defendants to the plaintiff under the first and second guarantees is not dependent on the second defendant's liability to the plaintiff, the lack of defence and affidavit of the second defendant in this suit, is immaterial to the third to fifth defendants.

[41] There is a third reason to dismiss Court Encl. No. 14. I am not satisfied that there will be an:

(a) Injustice to the third to fifth defendants; and

(b) Abuse of court process

- if this suit is not stayed until the expiry of the restraining order. In other words, the third to fifth defendants are not able to persuade this court to invoke its inherent powers under O. 92 r. 4 RC.

[42] Lastly, there is unexplained delay in filing Court Encl. No. 14. The same firm of solicitors represents all the defendants in this case as well as the first and second defendants in the SAHC which has granted the restraining order. Hence, the third to fifth defendants have knowledge of the restraining order. The restraining order has been obtained on 18 November 2014 but Court Encl. No. 14 is only filed on 8 January 2015, just four days before the first hearing of Court Encl. No. 8. There is thus a delay of more than one and half months which has not been explained in the affidavit of the third to fifth defendants in support of Court Encl. No. 14. Unexplained inordinate delay in filing a stay application, in itself may constitute a ground for the court to refuse to exercise its discretion to allow the stay application, even if there exists "special circumstances". In this case, with respect, I am of the view that Court Encl. No. 14 has been filed merely to delay the disposal of Court Encl. No. 8 and such a delay has indeed been occasioned.

[43] Based on the above reasons, I dismiss Court Encl. No. 14. Costs of RM4,000 is awarded to the plaintiff as Court Encl. No. 14 concerns a novel question of law regarding the effect of s. 176(10F) and (10G) CA as introduced by the Amendment Act.

Contentions of 3rd to 5th Defendants to oppose Court Encl. No. 8

[44] In resisting Court Encl. No. 8, the third to fifth defendants submit, among others, that the following matters need to be tried in this suit:

(a) Whether the first defendant has lawfully accepted the credit facilities from the plaintiff within the meaning of s. 7(a) of the Contracts Act 1950;

(b) Whether the plaintiff has validly reduced the limit for overdraft facility for the first defendant:

(i) pursuant to the first defendant's request; or

(ii) without the consent of the second to fifth defendants;

(c) Whether the plaintiff has proven that all the conditions precedent of the credit facilities have been duly complied with by the first defendant;

(d) Whether the plaintiff has adduced the following documents to prove its case against the first defendant:

(i) all authorisation, licenses, approvals and consent for the first defendant to carry on the first defendant's business and for the first defendant to apply for the credit facilities;

(ii) all the resolutions of the first defendant's board of directors (BOD) authorising the first defendant to apply for and to accept the credit facilities;

(iii) the first defendant's certificate of incorporation and its memorandum and articles of association; and

(iv) specimen signatures of the persons authorised to act on behalf of the first defendant in respect of the credit facilities;

(e) Whether the plaintiff has adduced BOD resolutions of the second and third defendants in support of Court Encl. No. 8. In this respect, the third to fifth defendants distinguished the High Court cases of *OCBC Bank (Malaysia) Bhd v. THS Hardware Sdn Bhd & Ors* [2012] 1 LNS 722; [2012] MLJU 785 (OCBC's case) and *Southern Bank Bhd v. Cempaka Aras (M) Sdn Bhd & Ors* [2009] 1 LNS 250; [2009] MLJU 210 (*Southern Bank*'s case) because in *OCBC*'s case and *Southern Bank*'s case, the necessary documents of the borrower companies, had been produced as evidence; and

(f) The plaintiff's affidavit in support of Court Encl. No. 8 (plaintiff's first affidavit) exhibited a certificate confirming that all the defendants owed the sum with the interest rates as stated in Court Encl. No. 8 (plaintiff's certificate of indebtedness). The third to fifth defendants contend that the plaintiff's certificate of indebtedness contains a manifest error because the plaintiff has failed to provide:

(i) a detailed account as to how the sum has accrued (plaintiff's calculation); and

(ii) statements of the first defendant's account with the plaintiff (first defendant's bank statements).

The third to fifth defendants rely on the Federal Court's judgment in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 to support the contention that the plaintiff's certificate of indebtedness contains a manifest error.

[45] The third to fifth defendants cited the following cases to oppose Court Encl. No. 8:

(a) The Court of Appeal case of *Woolley Development Sdn Bhd v. Mikien Sdn Bhd* [2008] 2 CLJ 303; [2008] 1 MLJ 585;

(b) The Court of Appeal's judgment in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281;

(c) The Supreme Court's decision in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400;

(d) The Court of Appeal case of *Noh Hyoung Seok v. Perwira Affin Bank Bhd* [2004] 2 CLJ 64; and

(e) The English Chancery Court's decision in *Hyde v. Wrench* (1840) 49 ER 132.

[46] The affidavit of the third to fifth defendants which has been filed to oppose Court Encl. No. 8 (defendants' affidavit), avers that the third to fifth defendants have not received the plaintiff's demand.

Court's Duties In Deciding A Summary Judgment Application

[47] The third to fifth defendants do not dispute that the following three matters required by O. 14 rr. 1(1) and 2(1) RC (three conditions for summary judgment) have been satisfied in this case:

(a) The statement of claim in this case (SOC) has been served on the third to fifth defendants;

(b) The third to fifth defendants have entered appearance; and

(c) The plaintiff's deponent (plaintiff's deponent) has affirmed the plaintiff's first affidavit verifying the facts on which the SOC is based and the belief of the plaintiff's deponent that there is no defence by the third to fifth defendants to the SOC.

[48] The three conditions for summary judgment has been decided by our Federal Court in the following cases:

(a) *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544, at pp. 551-552; and

(b) *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283, at p. 285.

[49] As decided in *Cempaka Finance Bhd* and *National Company for Foreign Trade*, once the three conditions for summary judgment have been satisfied by the plaintiff, the burden then shifts to the third to fifth defendants to resist Court Encl. No. 8 by satisfying the court under O. 14 rr. 3(1) and 4(1) RC that there is "an issue or question in dispute which ought to be tried".

[50] Even if the third to fifth defendants cannot raise any triable issue, Court Encl. No. 8 may still be dismissed under O. 14 r. 3(1) RC if "there ought for some other reason to be a trial", namely there are circumstances that ought to be investigated by the court – please see the Federal Court's judgment in *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 15; [1999] 1 MLJ 657, at pp. 666-668.

Grounds To Support Court Encl. No. 8

[51] Despite the third to fifth defendants bearing the burden to resist Court Encl. No. 8 by raising a triable issue as required by *Cempaka Finance Bhd* and *National Company For Foreign Trade*, I start by ascertaining whether the plaintiff has a valid and strong claim against the third to fifth defendants in the sense that no issue needs to be tried in this suit as regards the third to fifth defendants.

First And Second Guarantees Are Payable On Demand

[52] It is clear that by reason of cl. 1, the first and second guarantees are payable by the third to fifth defendants upon service of the plaintiff's demand. I rely on the following two Supreme Court decisions which have decided that on the construction of the guarantees in those cases, a demand against the guarantors constitutes a condition precedent for establishing liability against those guarantors:

(a) *Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd* [1987] 2 CLJ 197; [1987] CLJ (Rep) 219; [1987] 2 MLJ 610, at 610-611; and

(b) *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd & Another Case (1)* [1989] 2 CLJ 148; [1989] 1 CLJ (Rep) 186; [1989] 3 MLJ 155, at 156-157.

Has Plaintiff's Demand Been Served On Third To Fifth Defendants?

[53] As the first and second guarantees are payable by the third to fifth defendants on demand by the plaintiff, this court has to decide whether the plaintiff's demand has been duly served on the third to fifth defendants, especially when the defendants' affidavit has denied receipt of the plaintiff's demand.

[54] Clause 10 of the first and second guarantees (cl. 10) provides as follows:

> *Any notice or demand hereunder shall be issued by the Bank, its officers and/or agents and shall be deemed to have been sufficiently given if sent by ordinary post to the address in Malaysia last known to the Bank or stated hereon of me/us or the one of us to whom or to whose personal representatives such notice is given and shall be assumed to have reached the addressee in the course of post. …*
>
> (emphasis added)

[55] The plaintiff's demand has been:

(a) Addressed to three addresses of the third to fifth defendants as stated by the third to fifth defendants themselves in the first guarantee (executed by the third to fifth defendants) and second guarantee (signed by the fourth and fifth defendants); and

(b) Sent to the third to fifth defendants by "AR (acknowledged receipt) registered post" and also by way of "certificates of posting". The plaintiff's first affidavit has exhibited Pos Malaysia Berhad's the "Certificates of Posting" and "A.R. Registered Post" receipts of the Plaintiff's Demand on the third to fifth defendants.

[56] In *Amanah Merchant Bank Bhd (Formerly Known As Amanah Chase Merchant Bank Bhd) v. Lim Tow Choon (Through Official Assignee)* [1994] 2 CLJ 1; [1994] 1 MLJ 413, at 419, the Supreme Court in a judgment given by Mohd Dzaiddin SCJ (as His Lordship then was) decided as follows:

> *Bearing in mind the above principle, the learned judge ought to have given the word 'post' its ordinary and natural meaning and, in the context of cl 17, should not have made a distinction between ordinary post and AR registered post.* In *TO Supplies (London) LD v. Jerry Creighton LD 7*, Devlin J (as he then was) stated at p. 45:
>
> > *It appears to me that the word 'post' in its ordinary and natural meaning is wide enough to cover both registered and ordinary post, and I do not think that it is possible to limit it to one or the other.*
> >
> > *… A letter which is carried through the post, whether registered or not, is still 'posted' in the ordinary sense, and registration is merely one way of posting a letter.*
>
> *In the light of the meaning of the word 'post' stated above, it follows that a notice which is sent by post, whether registered or not, is still 'posted' in the ordinary sense of the word, and in the instant case, the fact that the notice of demand was sent by*

A *AR registered post would not make any difference since registration is merely one way of sending a letter.*

(emphasis added)

[57] Based on *Amanah Merchant Bank Bhd*, even though the plaintiff's demand has been sent by way of "AR Registered Post" and "Certificates of Posting", the plaintiff's demand has been duly served on the third to fifth defendants in accordance with cl. 10. Accordingly, cl. 10 deems the plaintiff's demand "to have been sufficiently given" and the plaintiff's demand "shall be assumed to have reached the (third to fifth defendants) in the course of post".

Failure Of Third To Fifth Defendants To Reply To Plaintiff's Demand

[58] Once the plaintiff's demand is deemed by cl. 10 to have been duly served on the third to fifth defendants, their failure to reply or deny the plaintiff's demand, clearly supports Court Encl. No. 8. The following cases are pertinent:

(a) In *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155, at 159, the Court of Appeal decided in a judgment by Gopal Sri Ram JCA (as His Lordship then was) as follows:

> During argument, we registered our surprise at the learned Judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.
>
> In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr. J. in *Tan Cheng Hock v. Chan Thean Soo* [1987] 2 MLJ 479-487:
>
> > In *Wiedemann v. Walpole* [1891] 2 Q.B. 534, 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise. Lord Esher M.R., in his judgment, remarked,
> >
> > > Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise. (Emphasis added). Earlier, in his judgment, he said, *'Now there are cases - business and mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.*'
>
> (emphasis added);

(b) David Wong Hon Leong has been affirmed by the Court of Appeal in a judgment given by Hasan Lah JCA (as His Lordship then was) in *Jetara Sdn Bhd v. Maju Holdings Sdn Bhd* [2007] 3 CLJ 41, at 55; and

(c) In *JEC Designabuild Sdn Bhd v. Bunga Kembang Sdn Bhd* [2007] 1 AMR 578, at 586-587, David Wong Dak Wah JC (as His Lordship then was) in the High Court held that a defendant's failure to reply to the plaintiff's demand for payment of a debt, would support a summary judgment application against that defendant in respect of the debt.

Effect Of Plaintiff's Certificate Of Indebtedness

[59] The plaintiff's deponent has affirmed the following in the plaintiff's first affidavit:

(a) The plaintiff's deponent has compared the plaintiff's certificate of indebtedness with the original entries in the plaintiff's banker's books (plaintiff's banker books) and the plaintiff's deponent has confirmed that the plaintiff's certificate of indebtedness is correct and is based on transactions carried out in the plaintiff's ordinary course of business; and

(b) The plaintiff's banker books are kept in the custody and control of the plaintiff at all times.

[60] Clause 11 of the first and second guarantees (cl. 11) reads as follows:

> It is agreed that a copy of the account of the Customer contained in the Bank's book of account signed by any officer of the Bank shall be conclusive evidence against me/us of the amount being due to the Bank from the Customer.

[61] The following two Federal Court cases have held that based on a contractual clause providing for the conclusiveness of a lender's certificate of the borrower's indebtedness, such a certificate is conclusive evidence of the borrower's indebtedness unless the borrower is able to prove fraud or can show manifest error in respect of the certificate:

(a) *Cempaka Finance Bhd*, at pp. 691-692; and

(b) *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282, at 284.

[62] I find that the plaintiff can rely on the plaintiff's certificate of indebtedness to support Court Encl. No. 8 for the following reasons:

(a) The first defendant's admission as stated in the scheme, clearly corroborates the contents of the plaintiff's certificate of indebtedness that the first defendant is indeed indebted to the plaintiff in respect of the credit facilities;

(b) The plaintiff's certificate of indebtedness is based on the efforts of the plaintiff's deponent in verifying the accuracy of the plaintiff's certificate of indebtedness based on the original plaintiff's banker books; and

(c) The plaintiff may rely on cl. 11 for reasons expressed below:

(i) the onus is on the third to fifth defendants to show that the plaintiff's certificate of indebtedness contains a manifest error – *Cempaka Finance Bhd*, at p. 691. This is consistent with the burden on the third to fifth defendants to raise a triable issue to resist Court Encl. No. 8 (please see *Cempaka Finance Bhd*, at pp. 551-552, and *National Company for Foreign Trade*, at 285).

The third to fifth defendants cannot discharge the above burden by merely alleging that there is a manifest error in the plaintiff's certificate of indebtedness. In this case, the defendants' affidavit did not show how or in what manner the plaintiff's certificate of indebtedness contains a manifest error. In *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690; [1995] 2 MLJ 363, at 367, the Court of Appeal held as follows in a judgment given by Mahadev Shankar JCA:

> *When an application is made for summary judgment under O 14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof. In the present case the guarantors do not appear to have appreciated this. Their affidavits merely relied on the defence they pleaded, which consists of bare denials and points of law which they could not sustain.*
>
> (emphasis added);

(ii) in *Tan Chong Keat v. Pengurusan Danaharta Nasional Bhd* [2008] 4 CLJ 748, at 754-755, the Court of Appeal decided as follows in a judgment given by Gopal Sri Ram JCA (as His Lordship then was):

> It follows, in our judgment, that *the submissions advanced by the appellant that the respondent had failed to discharge the burden of proving the sums due to the lending bank from the appellant is without merit. Once the respondent adduced in evidence the cl. 13 certificate of indebtedness, the debt was proved. It was then for the appellant to attack the said certificate on grounds of manifest error.* And that brings us to the second argument made before us.
>
> Learned counsel for the appellant submitted that the cl. 13 certificate of indebtedness was a useless piece of paper because the documentary evidence before the court had shown a reduction of the rate of interest by the lending bank on more than one occasion. Accordingly, the respondent's own documents produced at trial rendered the certificate of indebtedness so unreliable that the judge was not entitled to act upon it.

Although in para. 1 of his defence, the appellant stated, to use the pleader's words; "the plaintiff's claim is incorrect and does not specify the exact amount claimed, less whatever payments made", nowhere in that pleading is to be found an assertion that the certificate of indebtedness was bad for manifest error. Further, nowhere in the defence have there been any particulars pleaded, disclosing the nature of the alleged manifest error. In the face of this glaring omission, the learned judge cannot be faulted for failing to deal with the point. A plea of manifest error is a special plea, and in accordance with O. 18 r. 12 of the Rules of the High Court 1980 must be expressly taken. A plaintiff who relies on an account stated or a certificate of indebtedness is entitled, as a matter of natural justice, to know the grounds on which the account or certificate, as the case may be, is challenged on substantial grounds admissible in law. In our judgment, since the point was not properly taken by the appellant, it is not open to him now to raise this in his argument in support of his appeal.

(emphasis added);

(iii) in *Malaysia Debt Ventures Berhad v. MK Construction & Communication Sdn Bhd & Ors* [2012] 1 LNS 272; [2012] MLJU 308, at pp. 8-9, Zawawi Salleh J (as His Lordship then was) in the High Court held that a mere challenge by the debtor to the lender to particularise the payments made by the debtor, is not sufficient to oppose a summary judgment application;

(iv) contrary to the submission by the third to fifth defendants, the plaintiff need not adduce evidence to show the plaintiff's calculation. Nor is the plaintiff obliged to exhibit the first defendant's bank statements. If otherwise, the purpose and efficacy of cl. 11 will be defeated. To require the plaintiff to adduce evidence in the form of the plaintiff's calculation and the first defendant's bank statements, in my view, will be contradicting, varying or adding to cl. 11 which is not permitted by ss. 91 and 92 of the Evidence Act 1950 – please see Chang Min Tat FJ's judgment in the Federal Court case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, at 227-228;

(v) the third to fifth defendants did not request for the plaintiff's calculation and the first defendant's bank statements. In fact, the third to fifth defendants did not even reply to the plaintiff's demand;

(vi) the solicitors for the third to fifth defendants did not request at any time from the plaintiff's solicitors for the plaintiff's calculation and the first defendant's bank statements; and

(vii) the third to fifth defendants could have applied to court for further and better particulars (FBP) of the first defendant's indebtedness to the plaintiff under O. 18 r. 12(3) RC. Such a course of action has not been taken by the third to fifth defendants. In any event, I refer to the Court of Appeal's decision in *Chen Heng Ping*, at p. 370,

which has held that where the borrower is unable to show a manifest error on the face of a certificate of indebtedness, a FBP application may amount to a "fishing expedition".

Third To Fifth Defendants Cannot Rely On Contracts Between Plaintiff And First Defendant

[63] With respect to learned counsel for the third to fifth defendants, I cannot accept various contentions alleging that the credit facilities are invalid and unenforceable. Nor can I agree that the plaintiff has failed to adduce certain documents of the first defendant (such as the first defendant's authorisation, licenses, approvals and consent to carry on the first defendant's business as well as BOD resolutions of the first defendant). My decision is premised on the following grounds:

(a) It is clear from cls. 1 and 16 that the liability of the third to fifth defendants under the first and second guarantees is separate from the first defendant's liability to the plaintiff in respect of the credit facilities;

(b) By virtue of the doctrine of privity of contract, the third to fifth defendants cannot rely on any clause in the contracts between the first defendant and the plaintiff. The doctrine of privity of contract has been affirmed by our apex court on two occasions as follows:

(i) the first case is the Privy Council's decision in *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170, an appeal from Malaysia. In *Kepong Prospecting Ltd*, at p. 174, Lord Wilberforce held as follows:

> *The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it. In the first place there can, in their Lordships' view, be no doubt that if the agreement were governed by English Law, Schmidt would be unable to enforce it. Their Lordships need, on this point, do no more than state their agreement with the judgment of the Federal Court which correctly stated the law from well-known passages in the opinions of the House of Lords in Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 at p 853 and Scruttons Ltd Midland Silicones Ltd [1962] AC 446 at p 468. But it was suggested that in this respect the law of Malaysia differed from the law of England in admitting the principle of jus quaesitum tertio. Their Lordships are of opinion that the appellant company failed to make good this contention. Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs in so important a respect from English law*. It is true that section 2(d) of the [CA] gives a wider definition of "consideration" than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. **On the contrary paragraphs (a), (b), (c) and (e) [of s 2 CA] support the English**

conception of a contract as an agreement on which only the parties to it can sue. Reference was made to certain Indian decisions on the Indian Contract Act on which the [CA] is based. These were Subbu Chetti Arunachazam Chettiar (1930) ILR 53 Madras 270 (where however it was said that the balance of authority is in favour of the view that a stranger to the contract cannot without more sue to enforce it) and *Khirod Behari v Dutt Man Gobinda* AIR 1934 Cal 682. But other decisions in a contrary sense were cited which appeared to their Lordships to be more authoritative: their Lordships refer to decisions cited in *Subbu Chetti v Arunachazam Chettiar* and in Pollock and Mullaon the Indian Contract Act, 6th Edition, pp. 21 ff. and to two decisions so recent as 1957 (*Protapmull Rameswar State of West Bengal* 1957 61 CWN 78 and *Babu Ram v. Dhan Singh* AIR 1957 Punjab 169). These, in their Lordships' view, confirm that the law was correctly stated by Sir John Beaumont C.J. in the Bombay case of *National Petroleum Co Ltd Popatlal* AIR 1936 Bom 344. In a passage, which though strictly obiter, was based on a full argument and consideration of the cases, the learned Chief Justice expressed the view that *Khirod Behari Dutt v Man Gobinda* was opposed to established principle and authority. An argument on this legal issue was, so their Lordships were informed, submitted to the Federal Court: no reference to it appears in their judgment and their Lordships must assume that they did not accept it. The appellants failed to persuade their Lordships that they were wrong.

The 1954 agreement was therefore, in their Lordships' opinion, not enforceable by Schmidt against the appellant company, ...

(emphasis added); and

(ii) *Kepong Prospecting Ltd* has been followed by Gopal Sri Ram JCA (as His Lordship then was) in the Federal Court case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, at 431, as follows:

The notion that s 2(d) [CA)] had the effect of abolishing doctrine of privity of contract was exploded by the decision of the Privy Council in Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170. The Board there held that our law does not recognise a *jus quaesitum tertio* arising by way of contract. The concatenation of Indian cases giving rise to a conflict of opinion on the subject was referred to in the advice of the Board, which on that occasion was delivered by Lord Wilberforce. ...:

Kepong Prospecting is therefore authority for the proposition that the words 'or any other person' appearing in s 2(d) [CA] are not to be wide enough to exclude the doctrine of privity of contract.

(emphasis added); and

(c) It is to be noted that the following foreign legislation confers a right on a person who is not a party to a contract (third party) to enforce the contract if the contract expressly provides that the third party may do so or if the contract confers a benefit on the third party:

(i) the Contracts (Privity) Act 1982 (CPA) of New Zealand; and

(ii) the Contracts (Rights of Third Parties) Act 1999 (CRTPA) in the United Kingdom. It is to be noted that the CRTPA applies to England, Wales and Northern Ireland only.

Malaysia has no legislation equivalent to CPA and CRTPA. The application of the doctrine of privity of contract in this country has been affirmed in *Kepong Prospecting Ltd* and *Badiaddin*. To exclude or to modify the application of the doctrine of privity of contract in Malaysia, in my view, there must be legislative intervention along the lines of CPA and CRTPA. Accordingly, the third to fifth defendants cannot rely in this case on any clause in the contracts between the first defendant and the plaintiff.

Cases Cited By Third To Fifth Defendants Do Not Apply To This Case

[64] All the cases cited by the third to fifth defendant can be distinguished on one or more of the following grounds:

(a) There is no contractual provision to deem service of the plaintiff's demand;

(b) There is no failure to reply or deny the plaintiff's demand;

(c) There is no conclusive evidence contractual provision; and

(d) There was no first defendant's admission.

[65] As explained in, *Cempaka Finance Bhd* actually supports Court Encl. No. 8.

[66] Woolley Development Sdn Bhd, Bank Negara Malaysia and Hyde do not concern guarantees.

[67] Ng Hee Thoong may be explained on the ground that the bank did not reply to the guarantors' affidavit containing certain factual averments and hence, the bank was deemed to have accepted such averments which constituted triable issues and this in turn, supported a dismissal of the bank's summary judgment application.

[68] *Noh Hyoung Seok* may be distinguished as I have done in *Bank Kerjasama Rakyat Malaysia Bhd v. Brampton Holdings Sdn Bhd* [2015] 4 CLJ 635; [2015] 2 AMR 551, at 566, as follows:

> 31. I am of the considered view that *Noh Hyoung Seok* does not assist the Defendant in this case. In *Noh Hyoung Seok*, at pp. 69-70:

(a) The plaintiff bank sued, among others, the appellant/fourth defendant (D4) in respect of a guarantee executed by D4 in favour of the plaintiff bank;

(b) D4 sent a letter to the plaintiff bank stating that two officers of the plaintiff bank had verbally confirmed that D4 had been released as a guarantor (D4's letter). D4 named the two officers of the plaintiff bank in D4's Letter as Ms Lim and Encik Zulkifli;

(c) The plaintiff bank did not reply to D4's letter. Nor was there any explanation by the plaintiff bank for such a failure to reply to D4's Letter;

(d) Encik Mahmud bin Bidin, the deponent of the plaintiff bank's affidavit (plaintiff bank's affidavit) in support of the plaintiff bank's summary judgment application against D4, affirmed that neither he nor Mr Tan Kwee Hee (another officer of the plaintiff bank), had released D4 as a guarantor for the plaintiff bank. No reference was made by the plaintiff bank's affidavit to Ms Lim and Encik Zulkifli; and

(e) The Court of Appeal allowed D4's appeal against summary judgment ordered by the High Court because there was a conflict in affidavit evidence as to whether D4 was released as the plaintiff bank's guarantor and such a conflict could only be resolved at the trial of the plaintiff bank's suit against D4.

[69] The above material facts in *Noh Hyoung Seok* are clearly different from this case:

No Other Reason For Trial As Regards Third To Fifth Defendants

[70] In the first and second guarantees, the third to fifth defendants have declared that the third to fifth defendants:

(a) have been instructed by the plaintiff to seek independent legal advice;

(b) have confirmed that the third to fifth defendants have read and/or understood the contents of the first and second guarantees; and

(c) are aware of their obligations and liabilities before executing the first and second guarantees.

[71] I find that there is no circumstance in this case which ought to be investigated in respect of the third to fifth defendants as explained in *United Merchant Finance Bhd*. Hence, there is no other reason for trial in the present case for the third to fifth defendants.

No Costs On Solicitor-Client Basis

[72] The first and second guarantees do not provide for costs to be paid by the third to fifth defendants on an indemnity basis. Nor do the first and second guarantees provide for costs on a solicitor-client basis. Accordingly,

based on the wording of the first and second guarantees, I cannot grant costs on a solicitor-client basis to the plaintiff as prayed for in Court Encl. No. 8.

[73] Even if the first and second guarantees have provided for costs on an indemnity basis or on a solicitor-client basis, the plaintiff is only entitled to a scale of costs within the range of RM4,000 to RM15,000 as prescribed in O. 59 r. 22(1)(c)(i) read with part I of the Appendix to O. 59 RC. I refer to my earlier judgment in *Multi Square Sdn Bhd v. Lee Chee Meng* [2015] 1 LNS 187; [2015] AMEJ 543, at para. 37:

> 37. I am of the considered view that despite Clause 9(ii) [the guarantee in question], the Plaintiff is only entitled to scale of costs within the range of RM4,000 to RM15,000 as prescribed in Order 59 rule 22(1)(c)(i) read with Part I of the Appendix to Order 59 RC. My view is based on the following reasons:
>
> (a) a literal interpretation of Order 59 rule 22(1)(c)(i) RC supports the above view;
>
> (b) the Rules Committee uses the mandatory term "shall" in Order 59 rule 22(1)(c)(i) RC. In *Public Prosecutor v. Yap Min Woie* [1996] 1 MLJ 169, at 172-173, the Federal Court gave effect to the mandatory term "shall" in ss 12(1) and 28 of the then applicable Juvenile Courts Act 1947;
>
> (c) Order 59 rule 22(3) RC has expressly stated that costs on an indemnity basis may be given only for cases stipulated in Order 59 rule 22(1)(a) and (b) RC and not to summary judgment applications (as provided in Order 59 rule 22(1)(c)(i) RC);
>
> (d) the specific application of Order 59 rule 22(1)(c)(i) RC to summary judgment applications is preserved by the phrase "other than those falling within the ambit of rule 22" in Order 59 rule 21 RC. It is clear that Order 59 rule 21 RC does not apply to cases "falling within the ambit" of Order 59 rule 22 RC;
>
> (e) Order 59 rule 16(2) RC provides for the court's power to order costs on a standard or indemnity basis. However, Order 59 rule 16(2) RC is subject to Order 59 rule 22(1)(c)(i) RC. This is made clear in the opening phrase in Order 59 rule 16(2) RC, namely "Subject to the other provisions of these Rules";
>
> (f) Order 59 rule 22(1)(c)(i) RC is a specific provision for summary judgment applications and should be favoured over the general provisions of Order 59 rules 16(1), (2) and 21 RC in accordance with the rule of statutory interpretation of *generalibus specialia derogant*. In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719, at 758-759, the Court of Appeal applied the maxim *generalibus specialia derogant* to give effect to a specific provision of the National Land Code (NLC) in preference to a general provision in NLC; and

(g) if the Rules Committee has intended for the court to have the power to grant costs on an indemnity basis in summary judgment applications, the Rules Committee would have expressly provided as such in Order 59 rule 22(1)(c)(i) RC. This is however not the case. The wording of Order 59 rule 22(1)(c)(i) RC may be compared with the provision of Order 42 rule 12 RC. Order 42 rule 12 RC reads as follows:

> Subject to rule 12A, except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied.
>
> Order 42 rule 12 RC expressly confers power on the court to order post-judgment interest at the contractual rate agreed by the parties. There are no words in Order 59 rule 22(1)(c)(i) RC similar to the wording in Order 42 rule 12 RC which can authorise the court to give effect to Clause 9(ii) by ordering costs on an indemnity basis.

[74] I exercise my discretion pursuant to O. 59 r. 22(1)(c)(i) read with Part I of the Appendix to O. 59 RC to grant costs of RM4,000 to the plaintiff in respect of Court Encl. No. 8. This exercise of discretion is based on the following reasons:

(a) Court Encl. No. 8 is a simple and straight forward summary judgment application based on trite law of guarantee. No novel question of law in this case; and

(b) Court Encl. No. 8 does not concern many documents. In fact, the plaintiff has only filed two affidavits while the third to fifth defendants have only filed one affidavit.

Summary Of Court's Decision

[75] Premised on the above reasons, this court:

(a) Dismisses Court Encl. No. 14 with costs of RM4,000; and

(b) Allows Court Encl. No. 8 with costs of RM4,000.